STATE OF MICHIGAN

COURT OF APPEALS

JERRY TAYLOR,

Plaintiff-Appellant,

v

HOME DEPOT USA, INC.,

Defendant-Appellee,

and

KIMCO CORPORATION,

Defendant.

UNPUBLISHED
April 4, 2006

No. 266105
Kent Circuit Court
LC No. 04-002628-NO

Before: Murphy, P.J., and White and Meter, JJ.

METER, J. (*dissenting*).

I respectfully dissent from the majority's finding that there is a genuine issue of material fact regarding the application of the open and obvious doctrine to the facts of this case. I would affirm the circuit court's grant of summary disposition to defendant.

The open and obvious doctrine poses the following question: "Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection?" *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Thus, to survive a motion for summary disposition, a plaintiff must produce sufficient evidence to create a genuine issue of material fact that "an ordinary user upon casual inspection could not have discovered" the pool of water on the concrete floor. *Id*. As the majority recognizes, plaintiff has brought forth three pieces of evidence – Vodry's incident report, Robert Becker's testimony, and plaintiff's testimony – to attempt to establish a genuine issue of material fact. A close examination of these three pieces of evidence shows that plaintiff has failed to create a genuine issue of material fact.

With regard to Vodry's incident report, it is simply a rudimentary description of events: "Slipped on water in the back aisle . . . . Customer said he slipped and fell on his back." In no

way does this piece of evidence create an issue of fact regarding whether an ordinary user would have discovered the pool of water.

Becker's deposition testimony regarding the pool of water both before and after the plaintiff's fall is inconclusive at best. Concerning the water after the fall, Becker simply could not remember what was on the floor. He stated, "I know there was something on the floor, but I can honestly not remember what that something was. I don't know. Yeah, I don't remember what was on the floor." With regard to the visibility of the water spot before plaintiff's fall, Becker admits that he walked in the same general area of the water spot, but he did not recall seeing the spot. He stated, "To be honest with you, I was – with helping Mr. Taylor, I just wasn't paying attention to what was on the floor. . . ." Also, Becker did not know if he actually walked over the specific spot of water, stating, "Now whether I was in that particular little spot, I have no idea." In conclusion, Becker's testimony really adds only minimal benefit to plaintiff's case. While Becker did not see the water on the floor (which would help plaintiff's case), Becker does not remember exactly where he walked and admits not paying attention to the floor, making his testimony minimally valuable in determining what an ordinary person would have noticed when walking in the footsteps of plaintiff.

Plaintiff's own deposition testimony is most damaging to his case. While plaintiff claims that he did not see the water before he fell, he admits that, after the fall, he could clearly see the water while standing fully upright. The visibility of the water was detailed in plaintiff's testimony:

> *A.* I can see where I went through it [the puddle of water], yeah . . . . I can see where the foot went through it.
>
> *Q.* You could see the actual path?
>
> *A.* Yeah, you could see the actual path.
>
> *Q.* That was clear to you from just standing erect; true?
>
> *A.* Yeah. True.

This testimony clearly does not provide any evidentiary support for plaintiff's contention that "an ordinary user upon casual inspection could not have discovered" the pool of water on the concrete floor. *Id.* at 475. If plaintiff could clearly see the water on the floor, albeit after the fact, it is hard to comprehend how an "ordinary user" would not also see the water.

Plaintiff's evidence simply fails to create a genuine issue of material fact regarding whether "an ordinary user upon casual inspection could not have discovered" the pool of water on the concrete floor. *Id*. Vodry's incident report supports neither plaintiff nor defendant. Becker's testimony, due to its inconclusive nature, lends minimal support to plaintiff. Lastly, plaintiff's own testimony directly contradicts his own position on appeal; i.e., it shows that the water was visible to someone standing near it. While the open and obvious doctrine is an objective standard focusing on an "ordinary user," plaintiff's own after-the-fact observations are relevant and useful in determining what an "ordinary user" would have seen walking down the

aisle of defendant's store. Under the circumstances, I conclude that plaintiff has simply failed to establish a genuine issue of material fact warranting trial.

I would affirm the circuit court's grant of summary disposition to defendant.

/s/ Patrick M. Meter